BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRIDGETT MOORE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,221
AIG	)	
Respondent	)	
	)	
AND	)	
	)	
NATIONAL UNION FIRE INS. CO. OF PITTSBURG, PA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the January 20, 2012, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Workers Compensation Board heard oral argument on April 10, 2012. Due to a conflict, Board Member Gary R. Terrill recused himself from this appeal and Joseph Seiwert of Wichita, Kansas, was appointed as a Board Member Pro Tem by the Director.

APPEARANCES

William G. Manson of Kansas City, Missouri, appeared for claimant. Ryan D. Weltz of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board the parties stipulated claimant's date of accident was May 11, 2009.

ISSUES

In the January 20, 2012, Award, ALJ Hursh denied claimant an award of workers compensation benefits. The ALJ held:

> Looking at the entire record the court does not believe the claimant injured herself on the loose square of carpet. It is held the claimant failed to prove by a preponderance of credible evidence that she was injured arising out of and in the course of her employment. Therefore, the claimant is not entitled to workers compensation benefits.[1]

Claimant contends she is credible and has proven by a preponderance of the evidence that an injury occurred arising out of and in the course of her employment with respondent. Claimant, therefore, argues she is entitled to workers compensation benefits and requests past due temporary total disability benefits in the sum of $1,576.46, plus $1,211.80 for underpaid temporary total disability benefits, and permanent disability benefits based upon either functional impairment, work disability or permanent total disability.

Respondent asserts claimant is not credible and that she did not suffer personal injury by accident arising out of and in the course of her employment. Should the Board find claimant sustained a compensable accident, respondent argues claimant is not permanently and totally disabled, nor is she entitled to work disability benefits.

The issues before the Board on this appeal are:

1. Did claimant suffer a personal injury by accident on May 11, 2009?

2. If so, did claimant's accident arise out of and in the course of her employment?

3. If the Board finds claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent, is claimant entitled to any additional temporary total disability benefits?

4. If the Board finds claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent, what is the nature and extent of her disability?

5. If the Board finds claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent, is claimant entitled to future medical treatment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

---

[1] ALJ Award (Jan. 20, 2012) at 5.

Claimant went to work in respondent's call center in 2008. Ironically, she answered calls about workers compensation, gave clients information they were seeking, transferred them to adjustors, if necessary, and sent e-mails to adjustors and their supervisors. Claimant sat at a desk most of the day. The floor where claimant's desk and chair were located is carpeted. The floor is carpeted in blocks and one day, a few months before her alleged accident, claimant noticed one of the carpet blocks had pulled away from the floor and kept getting caught under her chair. She notified her supervisor, Kathy Spangler; however, for several months the carpet was not repaired.

Claimant testified that on May 11, 2009, she was sitting in her chair and attempted to scoot it over a hump in the block of loose carpet, but could not get her chair over the hump. Claimant tried harder a second time to get her chair over the hump, and jerked her back and hips forward. She said that this caused her to get a pinch in her lower back. Claimant did not tell anyone about the incident and finished the day at work. That night claimant put a heating pad on her back.

Claimant says that when she got up the next morning she could not get to a standing position. Claimant called Ms. Spangler and told her about the incident involving the chair and carpet. Claimant remained at home and Ms. Spangler made arrangements for claimant to see Dr. Lorraine Hougham, whose records were not introduced as evidence. Claimant testified she saw Dr. Hougham on two occasions. According to claimant, she was prescribed medications by Dr. Hougham and was advised to try and return to work in a few days. Claimant testified her pain was constant and that it felt like a hot poker was placed on her. Claimant called her workers compensation adjustor, Sarah Hangge, because of concerns that Dr. Hougham was "really not an expert."[2] Ms. Hangge arranged for claimant to see Dr. Adrian P. Jackson, an orthopedic specialist.

Claimant testified that prior to the May 11, 2009, incident she had no history of low back problems. Since 1998, claimant has had arthritis in her knees and hands, which is controlled with medication. At the time of her accident, claimant was using a walker. She suffers from COPD and uses oxygen. Before the incident, she did not have to use oxygen all the time, but now uses it twenty-four hours a day, seven days a week. She has also gotten much heavier since her alleged low back injury.

Claimant initially saw Dr. Jackson on May 27, 2009. Dr. Jackson's records contain a May 27, 2009, "Patient Contact Summary" which indicated he provided claimant with restrictions of no repetitive bending or lifting, alternate sitting and standing activities each hour as needed and lifting no more than fifteen pounds. Dr. Jackson examined claimant on May 27, 2009, and indicated in his records that the "physical exam today is somewhat

[2] R.H. Trans. at 21.

challenging secondary to her body habitus and moderate obesity."[3] He testified that "we couldn't eventually get her out of the chair so we did the exam in the seated position."[4] However, he was able to do palpations, straight leg raising in a seated position and reflex testing. No diagnostic imaging studies were performed or ordered by Dr. Jackson. His impression was that claimant suffered a lumbar strain. Dr. Jackson prescribed physical therapy and water therapy. The records from Dr. Jackson's May 27, 2009, examination of claimant indicate claimant was injured while trying to scoot her chair over a loose carpet square.

Claimant testified Dr. Jackson never did a blood pressure test, did not ask her to walk and did not perform a physical examination. Dr. Jackson took no x-rays, because claimant was too big to fit on his table. Dr. Jackson simply walked into the examination room and announced there was nothing he could do for claimant. Claimant went back to work within the restrictions she was given by Dr. Jackson. After the appointment, claimant called Ms. Hangge and told her about the appointment. Ms. Hangge told claimant she was trying to doctor hop, and to go back to work.

Dr. Jackson testified he placed his hands upon claimant when he performed Waddell's testing, which is designed to look for symptom magnification. He touched the skin over claimant's low back and higher up in the back and touched claimant's head. According to Dr. Jackson, Waddell's testing produced a reaction of excruciating pain, which was not proportional to the type of problems claimant alleged. He felt claimant was magnifying her symptoms. Dr. Jackson testified, "Listen, I'm trying to tell you her pain was out of proportion to what I was doing to her. She would not be able to wear a shirt with the pressure that I put on her back touching her skin. She wouldn't have been able to walk in here with a shirt on."[5] When asked if the strict mechanism of the injury at work could cause claimant's lumbar strain injury, Dr. Jackson indicated, "not likely in most people; in her case, who knows."[6]

Claimant testified she returned to work on May 28, 2009, within Dr. Jackson's restrictions. However, she had difficulty standing and walking and her back tightened up. Claimant kept calling Dr. Jackson's office to inform him about the difficulties she was having at work. He then completed a document entitled Patient Contact Summary dated May 29, 2009, which indicated claimant was temporarily totally disabled.

---

[3] Jackson Depo., Ex. 2.

[4] *Id.*, at 7.

[5] *Id.*, at 40.

[6] *Id.*, at 42.

Sometime after she saw Dr. Jackson on May 27, 2009, claimant began going to physical therapy in Lawton, Oklahoma, as she had moved there. She saw Dr. Jackson again on August 12, 2009. Dr. Jackson told claimant she should continue with her current course of treatment and prescribed more pain medication and muscle relaxants. On August 25, 2009, at 4:00 a.m., Dr. Jackson received a telephone call from claimant's daughter. Claimant's daughter told Dr. Jackson that claimant's pain was severe, and asked why claimant could not be taken off work. Claimant's daughter was concerned that claimant lived in Lawton, Oklahoma, attended physical therapy in Lawton, but that claimant's job was in Kansas City. In his record of that telephone call, Dr. Jackson stated, "It is my opinion that Ms. Moore is manipulating both her physical exam as well as her history in order to avoid vocational activities."[7] He also testified that claimant was abusing the system.

Claimant asserts her COPD was aggravated by her low back problems. Claimant also testified that her low back problems made her weight issues worse. She weighed approximately 450 pounds when going through physical therapy after the incident on May 11, 2009. Claimant testified she weighed 600 pounds when she was hospitalized in March 2010 for medical reasons unrelated to the incident on May 11, 2009. When claimant was discharged from that hospital stay, her weight had decreased to her baseline of 450 pounds. Claimant testified that before May 11, 2009, she was able to do everything she needed without assistance. Now claimant is receiving Social Security disability benefits.

At the request of her attorney, on June 8, 2010, claimant saw Dr. James A. Stuckmeyer, an orthopedic specialist. Claimant weighed 430 pounds and reported she had no back problems prior to May 2009. Dr. Stuckmeyer testified claimant had a great deal of difficulty standing for her examination. After examining claimant and reviewing her medical records since the May 2009 incident, his opinion was,

> Ms. Moore indeed represents a very complicated orthopedic evaluation. It would be the opinion of this examiner that as a direct and proximate result of the accident date of May 12 *[sic]*, 2009, Ms. Moore sustained an injury to her lumbar spine, with the development of acute lower back pain and radicular symptoms into both lower extremities, with evidence of bilateral sacroiliac dysfunction.[8]

As part of his evaluation of claimant, Dr. Stuckmeyer reviewed the medical records of Drs. Thomas Eiser and Michael Wright, who were authorized by respondent to provide treatment for claimant. He also reviewed the records of Drs. Hougham and Jackson. According to Dr. Stuckmeyer's report, claimant's chief complaint to Dr. Hougham was left sided and mid lumbar pain, with radiating pain into the buttock region. On September 9,

---

[7] *Id.*, Ex. 2.

[8] Stuckmeyer Depo., Ex. 2.

2009, claimant saw Dr. Eiser, who authorized x-rays and an MRI. The MRI revealed that the L5-S1 disc was mildly dehydrated, but was otherwise unremarkable.

Claimant saw orthopedic specialist Dr. Wright several times from November 19, 2009, through February 19, 2010. He obtained x-rays of the lumbar spine which revealed degenerative changes at L5-S1 without pars, fractures or instability. Dr. Wright reviewed the MRI scan ordered by Dr. Eiser. Noting the MRI was of extremely poor quality, Dr. Wright's review of the MRI discerned claimant had degenerative changes at L5-S1 with a probable annular tear. He recommended water therapy and epidural injections. Claimant received two epidural injections. Dr. Wright indicated claimant reached maximum medical improvement on February 19, 2010.

Dr. Stuckmeyer opined that in accordance with the AMA *Guides*,[9] claimant was in DRE Category IV and had a 20% permanent impairment to the body as a whole. This was based, in part, upon claimant's subjective complaints of bilateral radiculopathy. He felt claimant's present use of a walker for ambulatory support was reasonable and he recommended no prolonged standing, walking and sitting; no traversing of steps; and no lifting more than five to ten pounds occasionally from a sitting position. Dr. Stuckmeyer testified that he did not see any signs of claimant engaging in symptom magnification. He did not believe claimant had any positive Waddell's sign. He opined that because claimant is obese, she is more predisposed to sustain a back injury. He affirmed claimant's back condition did not cause her COPD to worsen.

Only the MRI report of Dr. Wright was reviewed by Dr. Stuckmeyer, not the actual MRI scan. He acknowledged there was nothing in the MRI report showing nerve entrapment, which would cause radiculopathy. He came to the same conclusion as Dr. Wright that claimant had degenerative changes at L5-S1 and an annular tear. Dr. Stuckmeyer opined claimant's symptoms were consistent with an annular tear. He confirmed Dr. Eiser's report stated claimant's MRI revealed only a dehydrated disc. Dr. Stuckmeyer concurred that there is no way, when looking at an MRI, to determine the age of an annular tear.

Respondent took the deposition of Adam Daniel Anderson, a former employee of respondent and co-worker of claimant's. Mr. Anderson worked for respondent for eight or nine months and quit in early to mid June 2009 to move to Utah. Mr. Anderson testified that he performed similar duties to those of claimant. His desk faced claimant's desk and they worked the same shift, which was from 10:00 a.m. to 7:00 p.m. At times, they would talk about various personal matters in their lives. Mr. Anderson did not remember an incident when claimant injured her back. Nor did he remember claimant complaining about the damaged carpet.

---

[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Mr. Anderson testified that at work, he and claimant had a conversation, prior to May 11, 2009, in which claimant said it would be very easy to get into the workers compensation system and receive benefits. Claimant stated she was off work for a workers compensation claim and was forgotten about. Consequently, she received more benefits than she was entitled to receive. The conversation took place during the last two hours of the shift, when things had slowed down. Mr. Anderson was told by claimant that she was glad to get hired by a good company and planned to build loyalty over the next few years and then file a claim for a back injury.

Mr. Anderson does not recall when the conversation took place, but had no conversations with claimant after May 11, 2009. He was very bothered by claimant's statements, but was reluctant to report the conversation. Consequently, he did not report the conversation to a supervisor. Mr. Anderson learned of claimant's injury from a co-worker some time after she did not return to work. Mr. Anderson testified that when his employment ended, he reluctantly reported his conversation with claimant to Ms. Spangler and to a Jim Dixon during an exit interview.

When Ms. Spangler testified, she was no longer employed by respondent. Ms. Spangler testified she had a conversation with Mr. Anderson on June 5, 2009, when he resigned his employment with respondent. Mr. Anderson told her about his conversation with claimant. Ms. Spangler prepared a short memo of the conversation, which was placed in claimant's file.

After claimant reported her injury, Ms. Spangler examined the carpet square and verified it was loose. She called maintenance, who fixed the carpet within two days. However, Ms. Spangler testified she had never previously received a complaint about the loose carpet square from claimant. Ms. Spangler testified she received a telephone call from claimant shortly after she was released to return to work. Claimant indicated she would have difficulty returning to work from Oklahoma and that the doctors were crazy and did not know what they were talking about. Until that telephone conversation, Ms. Spangler was unaware that claimant was living in Oklahoma.

After Mr. Anderson and Ms. Spangler were deposed, claimant was deposed on December 7, 2011. Claimant testified that on the date of her accident, she did not tell Mr. Anderson of the back injury. She denied having any conversation with Mr. Anderson that if a person wanted to get into the workers compensation system he or she could feign a back injury after getting into the good graces of the employer. She did recall telling Mr. Anderson that respondent had great health insurance and conversing about fraudulent claims. Claimant recalled that she told Mr. Anderson about her prior workers compensation claim at Rubbermaid and his response was that Rubbermaid should not have to pay claimant for her injury. From Mr. Anderson's comments made during conversations he and claimant had, claimant concluded that Mr. Anderson believed an employer should not be responsible for an employee getting hurt at work.

ALJ Hursh found claimant did not prove she suffered a personal injury by accident arising out of and in the course of her employment with respondent. The ALJ also indicated that, "The only evidence supporting the unlikely notion of an injury was Dr. Stuckmeyer's testimony about objective signs of injury."[10] ALJ Hursh then questioned the credibility of Dr. Stuckmeyer's testimony, because the MRI, which he opined revealed an annular tear, was of poor quality and the physicians' interpretation of the MRI differed. Also, there was no way to tell if the annular tear pre-dated claimant's injury. ALJ Hursh indicated there was evidence which weighed against claimant's credibility and cited several examples.

PRINCIPLES OF LAW

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[11] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[12]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[13]

K.S.A. 2008 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.
>
> An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

---

[10] ALJ Award (Jan. 20, 2012) at 4.

[11] K.S.A. 2008 Supp. 44-501(a).

[12] K.S.A. 2008 Supp. 44-508(g).

[13] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

> Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service. *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 198-99, 689 P.2d 837 (1984); *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).[14]

ANALYSIS

As a result of the incident on May 11, 2009, claimant asserts she has a significant low back injury with radiculopathy, substantial restrictions, experienced weight gain and a dramatic increase in her COPD symptoms. The ALJ and this Board as fact finders are asked by claimant to find that she sustained a significant personal injury by accident to her previously healthy low back when scooting her chair across a piece of damaged carpet. The Board declines to make such a finding and affirms the Award of ALJ Hursh.

Dr. Jackson, who for a period of time was claimant's treating physician, testified that in most people the mechanism of the May 11, 2009, incident would not cause the type of injury alleged by claimant. The results of his Waddell's tests are convincing to this Board. Claimant's MRI revealed a dehydrated disc and a possible annular tear whose date could not be determined. Dr. Stuckmeyer, claimant's expert, opined claimant had a significant permanent impairment of the low back, which was the result of the incident on May 11, 2009. However, Dr. Stuckmeyer did not review the actual MRI films. He acknowledged there was nothing in the MRI report that shows nerve entrapment that would cause radiculopathy. Dr. Stuckmeyer opined claimant's COPD symptoms did not increase as a result of her alleged back injury. When discussing Dr. Stuckmeyer's testimony and findings, the ALJ commented, "The corroborating evidence was, itself, of questionable credibility."[15]

The testimony of Mr. Anderson and Ms. Spangler is pivotal. At the time they testified, neither were employees of respondent. Although claimant and Mr. Anderson worked directly across from each other, claimant never told Mr. Anderson of the incident with her chair on the date it occurred. Nor did Mr. Anderson observe the incident wherein claimant alleges she suffered a back injury. His testimony concerning claimant's plan to file a false claim for a back injury is disturbing and consequential.

In this instance, the ultimate question turns upon the witnesses' credibility. Where there is conflicting testimony, as in this case, credibility of the witnesses is consequential. Here, the ALJ had the opportunity to personally observe the claimant testify while the balance of the witnesses' testimony was taken by deposition. In his Award, ALJ Hursh

---

[14] *Kindel v. Ferco Rental, Inc.,* 258 Kan 272, 278, 899 P.2d 1058 (1995).

[15] ALJ Award (Jan. 20, 2012) at 4.

stated claimant exaggerated and her "alleged injury was improbable."[16] In short, he believed respondent's witnesses and their version of the events over that offered by claimant and the Board concurs.

CONCLUSION

The Board finds claimant did not prove she sustained a personal injury by accident arising out of and in the course of her employment. All other issues are moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[17] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the January 20, 2012, Award entered by ALJ Hursh.

IT IS SO ORDERED.

Dated this ____ day of May, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[16] *Id.*

[17] K.S.A. 2011 Supp. 44-555c(k).

c: William G. Manson, Attorney for Claimant
bill@adlerandmanson.com

Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
rweltz@wsabe.com

Kenneth J. Hursh, Administrative Law Judge